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No. 97-1458

In the Supreme Court of the United States

OCTOBER TERM, 1997

EASTERN NATURAL GAS CORP., and DEST EXPLORATION, INC.,
Petitioners,

v.

ALUMINUM COMPANY OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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29 pp

QUESTIONS PRESENTED

1. Whether the Court of Appeals properly affirmed a jury verdict against Petitioners Eastern Natural Gas Corp. and Dest Exploration, Inc. (hereinafter collectively referred to as "ENG") for fraud where ENG failed to move for judgment as a matter of law at the close of all the evidence as required by Fed. R. Civ. P. 50(b) and where ENG claims it does not understand the Court of Appeals' reasoning for affirming the District Court's denial of ENG's motion for new trial.

2. Whether the Court of Appeals properly affirmed a defense verdict on ENG's breach of contract claim and properly refused to re-open on appeal the District Court's denial of ENG's motion for summary judgment on the breach of contract issue.

PARTIES TO THE PROCEEDING AND RULE 29.6 LISTING

The names of the parties to this proceeding appear on the cover. Aluminum Company of America ("Alcoa") is a publicly traded corporation. Alcoa has no parent company. The less than wholly owned direct subsidiaries of Alcoa have no publicly traded shares. Alcoa has the following non-wholly owned direct subsidiaries: Alcoa (Shanghai) Aluminum Products Company Limited; Alcoa International Holdings Company; Alcoa Latin American Holdings Corporation; Alcoa-Superior International L.L.C.; Capsulas Metalicas, S.A.; Shibazaki Seisakusho Limited; and, Squaw Creek Coal Company. Some of the direct subsidiaries of Alcoa have subsidiaries of their own, but again, any such subsidiaries that are less than wholly owned have no publicly traded shares.

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STATUTORY PROVISIONS INVOLVED

FED. R. CIV. P. 50

Judgment as a Matter of Law in Jury Trials; Alternative Motion for New Trial; Conditional Rulings

(a) **Judgment as a Matter of Law.**

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

(b) **Renewing Motion for Judgment After Trial; Alternative Motion for New Trial.**

If, for any reason, the court does not grant a motion for judgment as a matter of law made

at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment -- and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

(1) if a verdict was returned:

(A) allow the judgment to stand,

(B) order a new trial, or

(C) direct entry of judgment as a matter of law; or

(2) if no verdict was returned;

(A) order a new trial, or

(B) direct entry of judgment as a matter of law.

(c) **Granting Renewed Motion for Judgment as a Matter of Law; Conditional Rulings; New Trial Motion**

(1) If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new

trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered shall be filed no later than 10 days after entry of the judgment.

(d) **Same: Denial of Motion for Judgment as a Matter of Law.**

If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event

the appellate court concludes that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

FED. R. CIV. P. 59

New Trials; Amendment of Judgments

(a) **Grounds**. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in a action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law of make new findings and conclusions, and direct the entry of a new judgment.

(b) **Time for Motion**. Any motion for a new trial shall be filed no later than 10 days after entry of the judgment.

COUNTER STATEMENT OF THE CASE

Aluminum Company of America ("Alcoa") owned the rights to drill for oil and gas on certain property in Indiana owned by Peabody Development Company ("Peabody"). As a part of these rights, Alcoa had certain obligations to drill on and develop the land. In 1988, Alcoa sublet its rights to ENG in an agreement which required ENG to meet certain minimum spending and drilling obligations. Alcoa and ENG also entered an agreement which obligated Alcoa to buy gas obtained from the land in question. The sublease and the agreement to purchase gas were assigned to Dest Exploration, Inc. (Dest Exploration and ENG will be referred to collectively as "ENG").

ENG filed this action in the United States District Court for the Southern District of Indiana and alleged that Alcoa had breached the sublease and another agreement among the parties. Alcoa initially counterclaimed charging ENG with negligence and with breaching the sublease. During discovery, Alcoa uncovered falsified invoices that were designed to deceive Alcoa into believing that ENG was performing its obligations under the sublease. With leave of the District Court, Alcoa added a counterclaim for fraud. After a two-week jury trial, the jury returned a unanimous verdict in favor of Alcoa on both breach of contract and fraud. Except for a $100,000 downward adjustment in Alcoa's fraud judgment against ENG, the jury's verdict remained undisturbed through an extensive round of post-trial briefs in District Court, culminating in a comprehensive 25-page Order and Ruling by the Honorable Gene E. Brooks on November 14, 1996. R. 76. The verdict was also left undisturbed by the Court of Appeals, both in its unanimous

opinion on the merits and its unanimous Order denying re-hearing.

ENG's petition to this Court is yet another unwarranted attack on the jury's verdict and should be denied. ENG's petition presents no compelling issue of any kind and at best tries to draw this Court into a hypothetical debate about the application of Fed. R. Civ. P. 50.

REASONS FOR DENYING THE WRIT

I. There is no Basis for a Writ of Certiorari on the Judgment Against ENG for Fraud.

As to Alcoa's fraud judgment against ENG, the petition for writ of certiorari presents no compelling reasons for this Court to exercise its discretionary review powers and should be denied. First, ENG contends that the Court of Appeals erred when it enforced Rule 50(b). As discussed in section I.A., this issue is a red herring. ENG cured its failure to renew the Rule 50 motion by moving for a new trial which the District Court fully considered and acted upon. Moreover, despite ENG's failure to renew its Rule 50 motion at the close of all the evidence, the District Court nonetheless entertained and denied the motion on the merits.

Second, ENG contends that the Court of Appeals erred by not analyzing ENG's new trial motion on Alcoa's fraud counterclaim in a detailed written opinion. As discussed in section I.B, there is no need for this Court to compel the Court of Appeals to write down its reasons for affirming the District Court's denial of ENG's motion for a new trial.

A. ENG Presents No Compelling Reasons for Review Regarding ENG's Failure to Renew its Motion for Judgment as a Matter of Law.

Supreme Court Rule 10 makes clear that review by writ of certiorari is not a matter of right but of sound judicial discretion. A petition for writ of certiorari should be granted only in cases where there are special and important reasons for Supreme Court review. This Court has held that "special and important reasons imply a reach to a problem beyond the academic or the episodic." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). Further, this Court has stated that *certiorari* should not be granted "except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties..." *Id.* at 79.

While a traditional and accepted ground for *certiorari* is based in a conflict among the circuits, the purported conflict ENG presents is at best an "academic or ... episodic" problem as discussed by the Court in *Rice*. ENG moved for judgment as a matter of law on Alcoa's fraud counterclaim[1]

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[1] The Court of Appeals accurately recounted the fraud scheme perpetrated on Alcoa by ENG. ENG's President, Larry Corwin, admitted forging invoices and falsifying other documents to convince Alcoa that ENG was meeting its contractual obligations when in fact it was not. Alcoa testified that it was duped by this scheme and "would have 'absolutely' terminated its relationship with Dest if it had known that Corwin was lying and forging documents." *Eastern Natural Gas Corp. v. Aluminum Company of*

(continued...)

at the close of Alcoa's case. The District Court denied the motion, and the trial proceeded with a rebuttal case put on by ENG. Under Federal Rule of Civil Procedure 50(b), ENG's motion for judgment as a matter of law on Alcoa's fraud counterclaim had to be renewed at the close of *all* the evidence in order to be preserved for post-verdict motion practice and appeals. Fed. R. Civ. P. 50; *Umpleby v. Potter & Brumfield, Inc.*, 69 F.3d 209 (7th Cir. 1995).

As the Seventh Circuit Court of Appeals' opinion makes clear, ENG "conceded at oral argument" that *Umpleby* was controlling authority. *ENG v. Alcoa*, 126 F.3d at 1000. Relying on this concession, the Court of Appeals held that ENG had waived its Rule 50 argument by failing to renew the Rule 50 motion at the close of all the evidence. *Id.* at 1000.

Now, in contradiction of its position at oral argument below,[2] ENG urges, for the first time ever, that it

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[1](...continued)
America, 126 F.3d 996, 999 (1997); R. 134 at 910.

[2] When ENG acknowledged at oral argument that it failed to file a Rule 50 motion before the close of all the evidence, ENG never argued that it substantially complied with Rule 50. Rather, as noted above, ENG "conceded at oral argument that the [*Umpleby* decision] is determinative here." *ENG*, 126 F.3d at 1000. ENG is bound by this concession. *See United States v. Ortiz*, 422 U.S. 891, 898 (1975)(where Court refused to indulge government's argument that a particular case should not apply because government raised the issue for the first time in a petition for certiorari and because government had previously represented
(continued...)

"substantially complied" with Rule 50(b) and therefore qualifies for a "hardship" type of exception that it believes it has located in cases decided by the Fifth and Sixth Circuits. *See* Petition at 9 *(citing, Borhrer v. Hanes Corp., 715 F.2d 213, 216 (5th Cir. 1983), cert. denied, 465 U.S. 1026 (1984); Riverview Investments, Inc. v. Ottawa Community Improvement Corp., 899 F.2d 474 (6th Cir. 1990), cert. denied, 498 U.S. 855 (1990))*.

It has long been settled law that a precondition to the District Court's consideration of any post-verdict motion is that the motion first be made or renewed at the close of all the evidence. *Mallick v. International Brotherhood of Electrical Workers,* 644 F.2d 228, 233 (3d Cir. 1980) *(citing Lowenstein v. Pepsi-Cola Bottling Co. of Pennsylvania,* 536 F.2d 9, 11 (3d Cir.), *cert denied*, 429 U.S. 966 (1976)). This is the rule of law that applies even in the circuits which ENG contends have developed a liberal "substantial compliance" exception to Rule 50. *See, e.g., Jones v. Lewis,* 957 F.2d 260, 263 (6th Cir. 1992), *cert. denied*, 506 U.S.

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[2](...continued)
case was determinative).

ENG has waived its "substantial compliance" claim. It is well settled that this Court will not indulge an issue raised for the first time in a petition for writ of certiorari. *See Ortiz, supra*, 422 U.S. at 898. *See also, United States v. Williams*, 504 U.S. 36, 41 (1992)(Supreme Court will not review a claim that was neither pressed nor passed upon below); *Tennessee v. Dunlap*, 426 U.S. 312, 316 n.3 (1976)(Supreme Court will not address assertion which was not considered by District Court or Court of Appeals).

841 (1992); *Roberts v. Wal-Mart Stores, Inc.*, 7 F.3d 1256, 1259 (5th Cir. 1993).

Even the Circuits characterized as "harsh" by ENG, the Third and Eleventh Circuits, permit a party who failed to make a Rule 50 motion at the close of the evidence to make a motion for a new trial, as ENG has in the instant case. *See, e.g., Redd v. City of Phenix City, Alabama,* 934 F. 2d 1211 (11th Cir. 1991) (accepting motion for new trial as alternative for a motion for judgment as a matter of law); *Mallick, supra*, 644 F.2d at 234 (acknowledging that a request for binding jury instructions could satisfy the request for judgment notwithstanding verdict).

ENG thus cured its failure to renew the Rule 50 motion by making a Rule 59 motion which the District Court and Court of Appeals entertained and denied. It is well-settled that a Rule 59 motion for a new trial is a viable alternative where, as here, ENG, because of a procedural blunder, failed to move for judgment as a matter of law at the close of all the evidence. *See Umpleby v. Potter & Brunfield, Inc.,* 69 F.3d 209, 212-13 (7th Cir. 1995); 9A Charles A. Wright & Arthur W. Miller, Federal Practice and Procedure § 2539 at 362 (2d ed. 1995). All circuit courts of appeals agree and Rule 59 makes abundantly clear that a motion for judgment as a matter of law at the close of all the evidence is not a prerequisite for a post-verdict motion for a new trial. *See* Fed. R. Civ. P. 59.

One of the purposes of Rule 50 is to insure that the evidence in the record could properly support a particular verdict. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Here, that purpose has been fulfilled because, despite ENG's failure to renew the motion, the District Court

nonetheless indulged and denied ENG's post-verdict motion for judgment as a matter of law on the basis that there was ample evidence in the record to support the fraud verdict.[3]

Thus, ENG has already received what most parties in its situation are denied -- post-verdict review by the District Court of the matters raised in ENG's motion for judgment as a matter of law. There is no question that, at the District Court level, ENG has already received the same post-judgment review as parties who actually renew their motions at the close of all the evidence. Consequently, ENG suffered no harm despite its procedural blunder. The Court of Appeals though, addressed ENG's non-compliance with Rule 50(b) and, after taking note of ENG's concession that the issue had not been properly preserved, proceeded to enforce the rule. Particularly on these facts, there is no unsettled law

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[3] In its post-verdict motion for judgment as a matter of law on the fraud claim, ENG claimed that Alcoa failed to establish the reliance or damages elements of fraud. R. 124. In denying the motion, the District Court found "that there is clearly evidence from which a reasonable juror could determine that . . . Alcoa relied on the fraudulent acts of the plaintifs." R. 138 at 11. The District Court then cited extensive testimony from the trial to support its conclusion. R.138 at 11-14. The same is true for the damages element of fraud. R. 138 at 14-17.

or circuit conflict[4] here that would warrant review by the Court on writ of certiorari.

B. There is No Need for This Court to Compel the Court of Appeals to Write Down its Reasons for not Ordering a New Trial

ENG's petition urges this Court to exercise its supervisory jurisdiction under Supreme Court Rule 10 to compel the Court of Appeals to provide ENG with a specific written reason for affirming the District Court's denial of ENG's motion for a new trial. ENG seems to be arguing that this issue has somehow been left hanging by the Court of Appeals, when, in fact, the judgment of the Court of Appeals could not be more clear -- the judgment of the District Court is "affirmed." Such a ruling means the entire judgment below is affirmed, including in this case the aspects of the District Court judgment reflecting the District Court's denial

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[4] ENG's contention that there is a conflict among the circuit courts of appeals is unfounded and, as applied to this case, wholly irrelevant. The cases cited by ENG represent application of Rule 50 on a case by case basis and do not demonstrate any substantive conflict among the circuits. Moreover, any alleged conflict among the circuit courts of appeals is irrelevant in the instant case because ENG has moved for a new trial and is not prejudiced in any way by its failure to move for judgment as a matter of law at the close of all the evidence. The better reading of the cases cited is that, on the whole, the courts of appeals have applied the Rule 50 requirement on a case by case basis, without any discernable variations among the circuits in the basic purpose and intent of Rule 50.

of ENG's motion for new trial. ENG's belief that the Court of Appeals could have devoted more time or attention (or text of its opinion) to this issue is simply beside the point and hardly grounds for a writ of certiorari. Indeed, it would have been perfectly appropriate (and unremarkable) for ENG's entire appeal to have resulted in an affirmance without opinion.

ENG's mistaken belief that in affirming a district court opinion, the court of appeals must discuss every issue that was in the district court opinion is not supported in law or reason. "Procedural fairness does not require an appellate court to discuss every issue raised by an appellant." *Kairys v. I.N.S.*, 981 F.2d 937, 940 (7th Cir. 1992); *see also United States v. Carson*, 9 F. 3d 576, 593 (7th Cir. 1993), *cert. denied*, 513 U.S. 844 (1994) (refusing to discuss meritless claims); *Mainiero v. Jordan*, 105 F. 3d 361, 365 (7th Cir. 1997) (noting that an appellate court is not a "performing bear, required to dance each and every tune played on appeal").

Despite the Seventh Circuit's affirmance of the judgment of the District Court, ENG contends that the Court of Appeals somehow refused or neglected to address the motion for a new trial, as if the fraud claim was not included as part of the Court of Appeals decision. However, the Court of Appeals does address the fraud issue in sections A and B of its opinion affirming the district court judgment. *See* Petitioners' Appendix at A6-A8; *ENG v. Alcoa,* 126 F.3d at 999-1000. The Court of Appeals also acknowledged that ENG moved for a new trial on both the fraud and contract claims, and nowhere does the Court explicitly decline to rule on the motion for new trial on the fraud counterclaim. The Court's discussion of the facts of the case also makes it

clear that the jury's verdict against ENG on the fraud claim and the District Court's decision not to grant a new trial is affirmed.[5]

Finally, ENG petitioned the Seventh Circuit Court of Appeals for rehearing on the very same basis -- that the Court failed to address ENG's motion for new trial to ENG's satisfaction. *See* ENG's Petition for Re-hearing, Petitioners' Appendix at A-25. The appellate court unanimously denied ENG's petition, thereby removing all doubt as to whether the Court of Appeals believed ENG should receive a new trial on the fraud claim. December 1, 1997 Order; Petitioners' Appendix A17. ENG has had its many days in court on this issue and has shown no basis for Supreme Court review. The circuit court's decision not only acknowledges that issue, but affirms the judgment below in all respects.

II. The Petition for Writ of Certiorari should be Denied because ENG Cannot Re-open a Summary Judgment Issue on Appeal When the Issue Was Abandoned at Trial and Never Properly Preserved With a Rule 50 Motion.

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[5] The District Court comprehensively considered and rejected ENG's motion for new trial on the fraud claim, for a host of compelling reasons. R. 138 at 17-24. The one piece of the motion that the District Court found meritorious (regarding damages for fraud) was cured a few weeks later when Alcoa filed its acceptance of remittitur of the damage award from $450,000 to $397,339. R. 139. ENG's petition to this Court makes essentially no mention of this ruling.

ENG's third argument focuses on the partial summary judgment motion ENG filed over a year before the trial. When this motion was filed on August 1, 1995, ENG sought partial summary judgment on Counts I and II of ENG's complaint (R. 33), but only Count I has been included in ENG's petition to this Court.[6] The District Court denied summary judgment on Count I (alleging breach of an agreement to sub-lease) on March 15, 1996 due to genuine issues of material fact. R. 76. In so doing, the District Court rejected ENG's contention that Alcoa could not declare ENG in default of the sub-lease unless and until Peabody declared Alcoa in default of the main lease. R. 76. Applying Indiana contract law, the Court characterized ENG's contentions on this point as "specious" and leading to "patently absurd" results. For the rest of the pre-judgment portion of the case in District Court, ENG accepted this ruling. ENG did not renew its motion during the trial or at the close of all the evidence, thereby waiving post-verdict review by the District Court under Rule 50.

After hearing all the evidence, the jury returned a verdict for Alcoa on Count I of ENG's complaint, and the District Court entered judgment. ENG then filed a motion for judgment as a matter of law on Count I under Rule 50, or for a new trial under Rule 59. R. 125. The Rule 50 motion resurrected ENG's "specious" argument from August 1995 that Alcoa could not declare it in default until Peabody declared Alcoa in default. The Rule 50 motion even

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[6] Count II pertained to the August 1991 Letter Agreement, but ENG is not challenging the District Court's or the Court of Appeals' handling of this issue in the Petition. *See* Petition at 8 n.5.

incorporated ENG's summary judgment memoranda on this point. Alcoa opposed the Rule 50 motion for judgment as a matter of law on the grounds that ENG failed to preserve this argument by making the motion at the close of all the evidence. R. 126 at 17-18.

In a comprehensive 25-page Order and Ruling on Post-Trial Motions filed on November 14, 1996, the District Court agreed with Alcoa, yet proceeded to address and reject on the merits ENG's Rule 50 motion for judgment as a matter of law:

> It appears as if the plaintiff [ENG] *never made a motion for judgment as a matter of law on their breach of contract claim.* Thus, they cannot now renew any such motion. F.R.Civ.P. 50(b).
>
> The Court notes that, even if the issue had been preserved, there is clearly sufficient evidence in the record from which a reasonable juror could have found in favor of the defendant [Alcoa] on the breach of contract claim.

R. 138 at 4 (emphasis added). The District Court went on to rule that "[t]here is a multitude of evidence" that ENG did not perform its obligations under the contract and had defaulted, and that, in any event, there was evidence that no oil and gas could be located on the property and thus that ENG had suffered no damages. *Id.* Elsewhere in this ruling, the District Court rejected ENG's request for reconsideration of the March 1996 summary judgment ruling, and expressly

"reaffirm[ed]" its own prior ruling from March 1996. *Id.* at 10.

On appeal, the Court of Appeals held that the denial of summary judgment on ENG's argument that Alcoa could not declare it to be in default had become moot because of the trial on the merits of this claim. In its petition to this Court, ENG argues that the Court of Appeals was in error regarding the issue of whether Alcoa could declare ENG in default without any antecedent default notice from Peabody to Alcoa, an argument deemed to be "specious" and "patently absurd" by the District Court in March 1996.

ENG's petition fails to mention, though, that ENG had already prosecuted this same issue through post-trial motion practice, only to be flatly rejected by the District Court on three different grounds: (a) ENG failed to preserve the issue via a motion at the close of all the evidence; (b) ENG's contract claim as a whole had been completely rejected by the jury, and there was abundant evidence to support the jury's verdict; and, (c) ENG's theory about the necessity of a prior default notice from Peabody was already found to be "specious" and "patently absurd" by the District Court in March 1996 and was expressly "reaffirm[ed]" in response to ENG's "second try" on this point after the trial.

Somehow, ENG managed to ignore and essentially "leapfrog" this three-way defeat in the post-trial motion practice and present its summary judgment argument to the Court of Appeals for review. Following settled law, the Court of Appeals refused to do so, holding that a denial of summary judgment, followed by a full trial on the merits, is not reviewable on appeal.

The Court of Appeals was undoubtedly correct to decline to review this, as multiple authorities well illustrate. "As a general rule, the denial of a motion for summary judgment is not subject to review once the district court has conducted a full trial on the merits of a claim." *Watson v. Amedco Steel, Inc.*, 29 F.3d 274, 277 (7th Cir. 1994). When deciding a summary judgment motion, a court is deciding "based on the evidence of record, whether there is any material dispute of fact that requires trial." *Waldridge v. American Hoechst Corp.*, 24 F. 3d 918 (7th Cir. 1994). This Court has stated that "denial [of a motion for summary judgment] does not settle or even tentatively decide anything about the merits of the claim." *Switzerland Cheese Association, Inc. v. E. Horne's Marketing, Inc.*, 385 U.S. 23, 25 (1966); *see also Goldstein v. Cox*, 396 U.S. 471, 475 (1970). The law is clear that, and the overwhelming majority of courts have reasoned that, an appellate court need not review an order denying summary judgment once there has been a full trial on the merits of the case:

> to be sure, the party moving for summary judgment suffers an injustice if his motion is improperly denied. This is true even if the jury decides in his favor. The injustice arguably is greater when the verdict goes against him. However, we believe it would be even more unjust to deprive a party of a jury verdict after the evidence was fully presented, on the basis of an appellate court's review of whether the pleadings and affidavits at the time of the summary judgment motion demonstrated the need for a trial.

Locricchio v. Legal Services Corp., 833 F. 2d 1352, 1359 (9th Cir. 1987) (emphasis added); *see also Holly v. Northrup Worldwide Aircraft Services, Inc.*, 835 F. 2d 1375, 1377 (11th Cir. 1988) ("Summary judgment was not intended to be a bomb planted within the litigation at its early stages and exploded on appeal"); *Black v. J.I. Case Co.*, 22 F. 3d 568 (5th Cir. 1994); *Johnston International Co. v. Jackson National Life Insurance Co.*, 19 F. 3d. 431, 434 (8th Cir. 1994); *Lama v. Borras*, 16 F. 3d 473, 476, n.5 (1st Cir. 1994); *Whalen v. Unit Rig, Inc.*, 974 F. 2d 1248, 1250-51 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 1417 (1993); *Bottineau Farmers Elevator v. Woodward-Clyde Consultants*, 963 F.2d 1064, 1068 n. 5 (8th Cir. 1992).

Particularly in view of the full procedural history of this issue below, ENG has shown no basis for yet another post-verdict round of review of the denial of its summary judgment motion under Indiana contract law.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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